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No. 92-1775

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RAWL SALES AND PROCESSING COMPANY,
Petitioner,
v.
TRUSTEES, UNITED MINE WORKERS OF AMERICA 1950 PENSION TRUST, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

JULIA PENNY CLARK
(Counsel of Record)
JEREMIAH A. COLLINS
VIRGINIA A. SEITZ
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DAVID W. ALLEN
General Counsel
UMWA HEALTH & RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
Counsel for Respondents

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF IN OPPOSITION

The petition states three questions for review, two of which petitioner did not deem of sufficient importance to raise in the Court of Appeals. In addition, two of the three questions in the petition are premised on petitioner's assertion that the evergreen clause, the unique collectively-bargained provision at issue here, was a waiver of petitioner's statutory right to bargain. That premise was rejected—unremarkably—by the Court of Appeals, which correctly held that the evergreen clause was an *exercise*, not a waiver, of petitioner's right to bargain. The remaining question presented is entirely disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). The judgment of the Court of Appeals in petitioner's interlocutory appeal implicates no important

issue of federal law, and no issue of federal law on which the circuit courts of appeals have adopted conflicting positions. *Certiorari* should be denied.

STATEMENT OF THE CASE

1. The respondents in this case are four multiemployer benefit trusts which provide pension and health benefits to retired and disabled coal miners and their families (hereafter "Trusts"). The Trusts brought this action to enforce a provision in the governing plan and trust documents known as the "evergreen" clause.[1]

The evergreen clause was first added to the plan and trust agreements governing the Trusts in 1978, through collective bargaining between the Bituminous Coal Operators' Association ("BCOA"), a multiemployer association of coal companies, and the United Mine Workers of America ("UMWA"). At that time, the Trusts had massive unfunded liabilities. The BCOA was strongly concerned that, in the future, many contributing employers might continue to operate in the bituminous coal industry, but attempt to escape their share of this future cost liability by negotiating cut-rate contributions or by ceasing

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[1] Effective February 1, 1993, while this case was pending in the Court of Appeals, the two respondent health benefit Trusts were merged into the United Mine Workers of America Combined Benefit Trust, an entity whose creation was mandated by the Coal Industry Retiree Health Benefit Act of 1992. *See* Subtitle C of the Energy Policy Act of 1992, H.R. 776, 102d Cong., 2d Sess. (1992). At an appropriate time, the Trusts will file in the district court a motion requesting that the court substitute the Combined Benefit Trust for the plaintiff health benefit Trusts.

That 1992 Act is designed to secure the future funding of the health benefits that were provided by two of the four respondent Trusts. Although the Act does not affect the Trusts' claims against Rawl and other employers for the period prior to February 1, 1993, funding for the health benefits that were provided by those two Trusts will be provided after February 1, 1993, through statutory premiums rather than contractual contributions under future National Bituminous Coal Wage Agreements ("NBCWAs").

all contributions.[2] If any employer succeeded in doing so, its share of the Trusts' benefit costs would fall on the remaining employers, even though its former employees would continue to receive full benefits from the Trusts.[3] The result would imperil the future funding of these benefits.

In response to the BCOA's concern, the UMWA agreed to place provisions in the plan and trust documents that would bind all employers participating in the Trusts, and that would prevent individual employers from negotiating cut-rates or from pulling out of the Trusts. The evergreen clause was the principal provision added for this purpose.

This is the evergreen clause that was part of Rawl's agreement in 1981:

> Any employer who employed any participant eligible for coverage under, or who received or receives benefits under, the 1950 Pension Plan, or any Em-

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[2] At all times, contributions to the Trusts have been based on hours worked in jobs covered by the NBCWA or on tons of coal produced; thus, only employers which continue to operate in the bituminous coal industry incur a contribution obligation to the Trusts.

[3] The reason for this is rooted in the unique nature of the coal industry. "The continual discovery of new coal mines and exhaustion of old ones leads to a very high turnover of employers in the coal industry. Because of this and the mobility of employees, labor and management in the industry have since 1950 worked out a means for assuring workers retirement benefits without linking specific workers to specific employers. They have done this through national, multi-employer agreements between the [UMWA and the BCOA]. All coal companies that join the agreements pay into the same health and benefit funds at a specified rate per ton of coal produced, and all eligible employees receive benefits from those funds without reference to the employers they happened to be working for at the time of their retirement." *Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992). A retired miner also continues to receive benefits from the multiemployer Trusts if his former employer goes out of business or stops contributing; such "orphans" make up about half of the current beneficiaries of two of the Trusts.

> ployer who was or is required to make, or who has made or makes contributions to the 1950 Pension Plan and Trust, is obligated and required to comply with the terms and conditions of the 1950 Pension Plan and Trust, as amended from time to time, including, but not limited to, *making the contributions required under the National Bituminous Coal Wage Agreement of 1978, as amended from time to time, and any successor agreements thereto, including but not limited to, the National Bituminous Coal Wage Agreement of 1981.* [Emphasis supplied] [4]

In the words of the Court of Appeals, the evergreen clause provided "that participating employers . . . were bound to make continuing contributions to the trusts, and that the amounts of contribution would be as specified in future NBCWAs," which are the master agreements for the bituminous coal industry negotiated by the BCOA and the UMWA. 984 F.2d 469, 472.

After its 1981 agreement expired on September 30, 1984, Rawl withdrew from the BCOA. Although Rawl continued to operate in the bituminous coal industry, it did not make contributions to the Trusts at the rates required under either the 1984 NBCWA or the 1988 NBCWA. Instead, Rawl negotiated an agreement with the UMWA which purported to allow Rawl to contribute to the Trusts at cut-rates during a portion of the term of the 1984 NBCWA and then to eliminate Rawl's contribution obligation entirely as of January 31, 1988.

2. The Trusts sued Rawl to collect contributions at the uniform national rates. The District Court granted the Trusts' motion for summary judgment on issues of lia-

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[4] The evergreen clause quoted in text appeared in the 1981 governing documents of the 1950 Pension Trust. Identical language, with appropriate changes in the name of the Trust, appeared in the governing documents of each of the other three Trusts. In the trust documents for other years, the date in the final phrase of the evergreen clause was different: it always referred to the then-current NBCWA.

bility. The court observed that the Trusts' extrinsic evidence of the intent of the evergreen clause was "voluminous and persuasive," and "made an extremely persuasive showing regarding the intent of the evergreen clause." App. 33, 35. The court rejected Rawl's argument that enforcement of the evergreen clause would violate federal labor policy and its argument that Rawl had not clearly and unmistakably waived its statutory right to bargain with the UMWA over pension and health benefits issues. App. 38-43.

Rawl then moved for reconsideration of the District Court's decision. The District Court denied the motion, but amended its order to allow an interlocutory appeal under 28 U.S.C. § 1292(b).[5]

3. Rawl appealed. The D.C. Circuit affirmed the decision of the District Court granting summary judgment to the Trusts, and remanded for completion of the district court proceedings.[6] The court stated that the "language of the relevant provisions in the applicable trust and collective bargaining agreements unambiguously obliges signatory employers to contribute to the trusts at the rates specified in the current NBCWA, irrespective of the employer's failure [to] sign that NBCWA." 984 F.2d at 473. The court further held that this interpretation of the clause was "corroborated by voluminous extrinsic evidence submitted by the Trustees," *id.* at 474.[7]

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[5] The order granting summary judgment was interlocutory because it did not determine the amount of Rawl's liability to the Trusts.

[6] Petitioner's appeal was consolidated with an appeal from the district court's order of summary judgment enforcing the evergreen clause against certain coal subsidiaries of The Pittston Company, *see United Mine Workers of America 1974 Pension Trust v. Pittston Co.*, 984 F.2d 469 (D.C. Cir. 1993). The Court of Appeals' judgment was the same in both cases.

[7] Rawl asserts that "Rawl *and* the Union, as *amicus*, urged the *courts* below" to refuse enforcement of the evergreen clause. *See* Petition at 9 (emphasis supplied). The UMWA did support Rawl

Rawl did not argue in the Court of Appeals either that a "perpetual waiver of the right to bargain . . . should not be permitted as a matter of national labor policy," *see* Petition at 12, or that "a multi-employer bargaining association should not be permitted to waive in perpetuity the statutory rights of its members," *see* Petition at 19, although these are the first two issues presented in its petition for certiorari.[8] The D.C. Circuit did not address these issues.

The court did reject Rawl's argument that the evergreen clause constitutes a "waiver" of bargaining rights which must be "clear and unmistakable" to be enforced. The court held that:

> "[T]o the extent that a bargain resolves any issues, it removes that issue *pro tanto* from the range of bargaining." Here, the UMWA and the BCOA agreed on a basis for determining the employers' pension fund contributions. When [Rawl and other employers] signed onto the applicable agreements, they bound themselves to abide by the agreed-upon contribution rates into the future. This was a valid exercise of bargaining rights, and the agreement reached by the parties is fully enforceable against [Rawl]. There is no issue of waiver in this case. [984 F.2d at 479 (citation omitted).]

REASONS THAT THE PETITION SHOULD BE DENIED

This evergreen clause exists only in the unionized sector of the bituminous coal industry. We know of no other industry in which employers and unions have agreed to assure the long-term funding of retiree benefits through a similar contractual provision. Moreover, apart from the unique character of the clause, none of the three

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in the district court, but did not participate in the proceedings before the Court of Appeals.

[8] These issues were not raised by any party to the appeal. The second of these issues was raised briefly in one of several *amicus* briefs filed before the D.C. Circuit—that of Island Creek Corp., *et al.*

questions stated in the Petition presents an issue of importance for this Court's review.

I. THE ALLEGED WAIVER OF RAWL'S STATUTORY RIGHT TO BARGAIN (QUESTIONS 1 AND 3 OF THE PETITION)

Questions 1 and 3 of the petition inquire, respectively, (a) whether the evergreen clause, as a perpetual waiver of Rawl's statutory right to bargain, is unenforceable under federal labor law; and (b) whether, assuming the evergreen clause is an enforceable perpetual waiver, it must be "clear and unmistakable," *see Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 705 (1983).

A. Question 1 was not raised in the Court of Appeals. The Court of Appeals, accordingly, did not decide it. There is no reason for this Court to reach out and decide that question.[9]

B. Another fundamental flaw of Questions 1 and 3 is that their premise—that the evergreen clause is a *waiver*—is false. In a long line of decisions, the D.C. Circuit has warned against confusing a *waiver* of statutory rights—which occurs when a party knowingly and voluntarily relinquishes its right to bargain about a matter—with an *agreement* that "fixes the parties' rights and forecloses further mandatory bargaining." *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 640 (D.C. Cir. 1991).[10]

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[9] *See, e.g., Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (the "claim was not passed on by the Court of Appeals—nor does it appear to have been presented to that court as a distinct ground for its decision. Thus, we will not consider it here") (citation omitted); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) ("that question was not raised in the Court of Appeals and is not properly before us"); *EEOC v. FLRA*, 476 U.S. 19, 26 (1986) (same).

The subsidiary arguments to Question 1, which appear at pages 15-18 of the petition, likewise were not presented to, or decided by, the Court of Appeals.

[10] *See also Connors v. Link Coal Co., supra*, 970 F.2d at 905; *Department of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992);

Where the parties to a collective bargaining agreement have agreed on rules that will govern their conduct, they have *exercised* their bargaining rights as to those rules, and the legal standards for finding a waiver of bargaining rights do not apply. As the Court of Appeals fully explained in *Dept. of the Navy v. FLRA*, 962 F.2d 48, 57 (D.C. Cir. 1992): "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain over a matter; but where the matter is covered by a collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." (Emphasis in original). *Accord, Chicago Tribune Co. v. NLRB*, 974 F.2d 933, 937 (7th Cir. 1992) (" 'where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather, the contract will control' ") (quoting *Local Union No. 47, IBEW v. NLRB*, 927 F.2d 635, 641 (D.C. Cir. 1991)).

The essence of Rawl's argument that the Court of Appeals was wrong in concluding that the evergreen clause is not a waiver appears to be as follows: The evergreen clause is a "perpetual" obligation whose precise economic dimensions are unknown; such a lengthy and uncertain commitment must be deemed a waiver of bargaining rights, rather than a contractual obligation. *See* Petition at 12-13.

Rawl's position is untenable. Initially, we note that, while the Court of Appeals did not take issue with Rawl's contention that the evergreen obligation was perpetual, 984 F.2d at 474, it is not. The evergreen obligation continues as long as—but *only* as long as—the BCOA and the UMWA set national contribution rates for the Trusts.[11]

United Mine Workers of Am., Dist. 31 v. NLRB, 879 F.2d 939, 943-44 (D.C. Cir. 1989).

[11] If a contract is "terminable upon the occurrence of some event," it is not an indefinite contract terminable at will by either party. *E.g., First Commodity Traders, Inc. v. Heinold Commodities, Inc.*,

In addition, the precise extent of the evergreen obligation is pegged to the contribution rates agreed to in future NBCWAs. The use of a general industry standard for uniform contribution rates for multiemployer benefit plans is akin to pegging economic terms to the consumer price index or other national or local standards—an entirely commonplace provision in collective bargaining agreements.[12]

We are aware of no authority supporting the proposition that a contractual obligation of this nature is unenforceable or that it constitutes a waiver of bargaining rights. Instead, there are numerous cases in which courts have enforced employers' collectively-bargained obligations to provide retirees with lifetime pension and health benefits—obligations as long-term and potentially open-ended as those created by the evergreen clause.[13]

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766 F.2d 1007, 1012 (7th Cir. 1985); *Payroll Express Corp. v. Aetna Casualty & Sur. Co.*, 659 F.2d 285, 291 (2d Cir. 1981).

In addition, legislation enacted in 1992 has replaced the contractual obligation arising from the evergreen clause with a statutory obligation to fund benefits that were previously provided by two of the four Trusts. *See* note 1, *supra*.

[12] Rawl's innuendo that the BCOA is attempting to gain a competitive edge over non-BCOA coal companies by "setting higher contribution rates applicable to non-BCOA members or from negotiating improved benefits only for employees of active BCOA members," Petition at 14 & n.6, is baseless. In support of its assertion, Rawl cited a fragment of the 1991 BCOA/UMWA reopener agreement; the remainder of the document—not in the record—clearly provides that *any* contributing employer—not just any BCOA member—which accepted the reopener settlement negotiated by BCOA and the UMWA could shift its liability for retirees' death benefits to the Trusts.

[13] *See, e.g., Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989); *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984). The evergreen clause is unique in that employers undertake a long-term obligation to make specified

In brief, Rawl's agreement to contribute to the Trusts at the uniform rate set through national agreements involved the exercise, rather than the waiver, of its right to bargain. And the arguments Rawl now makes in support of its contention that enforcement of this agreement would violate the federal labor policy were not presented to, or decided by, the Court of Appeals. Thus, Questions 1 and 3 of the petition do not merit this Court's review.

C. Rawl's effort to manufacture a conflict among the circuits with respect to Question 3 of the Petition is also unavailing. There is no conflict among the circuits with respect to whether the D.C. Circuit's sensible distinction between a waiver and an exercise of bargaining rights is correct. The D.C. Circuit and the Seventh Circuit are the only circuits that have addressed this question directly, and they are in accord. *See supra* at 8.[14]

The law in the Sixth Circuit is not to the contrary. In *NLRB v. General Tire & Rubber Co.*, 795 F.2d 585 (6th Cir. 1986), discussed at length in the petition, the collective bargaining agreement obligated the employer to continue pension payments for 90 days after termination of the agreement. Without bargaining with the union, the employer terminated the payments *after* 90 days. Thus, the question in *General Tire* was whether a party had waived its right to bargain *after* the contractual obligation to make payments had *expired*; that situation is a far cry

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contributions while, in most industries, employers enter into long-term contractual commitments to provide specified *benefits*. But there is no reason that federal labor policy would approve enforcement of the latter while making the former unlawful.

[14] The Eleventh Circuit, too, has noted that the question whether a party has "waived" its right to bargain about an issue is entirely distinct from the question whether an issue is "covered" by a collective bargaining agreement. *See Mead Corp. v. NLRB*, 697 F.2d 1013, 1020 (11th Cir. 1983).

from this case, in which Rawl has an ongoing, effective contractual obligation to contribute to the Trusts.

In any event, even if Rawl were correct—which it is not—that the evergreen clause waives bargaining rights and that there is a conflict among the circuits with regard to the applicable standard for determining whether a waiver has occurred, this case would not merit the Court's review. The record of this case plainly demonstrates that Rawl's alleged waiver of its statutory bargaining rights was "clear and unmistakable." *E.g.*, 984 F.2d at 475-76 ("the Trustees provided the District Court with a compelling argument and specific evidence indicating that theirs was the only reasonable interpretation of the evergreen clause and that no material factual dispute remained for trial"). Thus, the result in this case would not change even if this standard were applied, and this case does not genuinely present the question of whether the "clear and unmistakable waiver" standard must be applied.

II. THE ALLEGED WAIVER OF RAWL'S STATUTORY RIGHT TO WITHDRAW FROM MULTIEMPLOYER BARGAINING (QUESTION 2)

Although phrased in terms of waiver, the remaining question presented in the petition is whether the evergreen clause coerces Rawl in the selection of its bargaining representative by compelling it to bargain through a multiemployer association (BCOA), contrary to section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(B).

The Court should not exercise its discretion to review this question, which no party raised in the Court of Appeals, and which the Court of Appeals did not address.[15]

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[15] As noted above, one of the *amici* in the Court of Appeals raised this issue briefly. The D.C. Circuit, like this Court, apparently did not consider itself required to address an issue raised only by an *amicus curiae*, *see United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

In any event, this question does not merit this Court's review. It is fully disposed of by this Court's decision in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). In *Amax*, a case involving the same multiemployer funds as those at issue here, the Court rejected employer arguments that are closely analogous to those respondent makes here. The employer argued that when the UMWA went on strike over a demand that the employer agree to participate in these multiemployer funds, it violated the Section 8(b)(1)(B) prohibition against "coerc[ion of] . . . an employer in the selection of his representatives for the purposes of collective bargaining," 29 U.S.C. § 158 (b)(1)(B). *See* 453 U.S. at 326-27. This Court rejected that contention, explaining that participation in a multiemployer trust fund is not the same thing as participation in multiemployer bargaining. *Id.* at 334-38. The Court concluded that very different federal labor policies apply in the two contexts:

> Congress enacted § 8(b)(1)(B) largely to prevent unions from forcing employers to join multiemployer bargaining units, or to dictate the identity of those who would represent employers in collective-bargaining negotiations or the settlement of employee grievances. . . . *However, the power of a union to strike or bargain to impasse to induce an employer to contribute to a multiemployer trust fund does not pose the danger Congress sought to prevent. Congress treated the issues of multiemployer bargaining units and multiemployer trust funds quite distinctly.* It is permissible under the law, and may be in the interest of the public, for an employer to bargain separately with a union, independently of any industrywide employer association, while the union exerts economic pressure to obtain protection for the employees through the medium of a multiemployer benefit fund.

Id. at 334-35 (emphasis supplied).

If union pressure to contribute to a multiemployer trust does not constitute pressure to join or continue multi-

employer bargaining, it necessarily follows that the contract binding petitioner to continue to participate in a multiemployer trust is not equivalent to a perpetual designation of BCOA as its agent for multiemployer bargaining or a waiver of petitioner's right to negotiate separately. For that reason, again, even if this question had been addressed by the Court of Appeals, it would not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JULIA PENNY CLARK
(Counsel of Record)
JEREMIAH A. COLLINS
VIRGINIA A. SEITZ
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

DAVID W. ALLEN
General Counsel
UMWA HEALTH & RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
Counsel for Respondents